

**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

In the matter of

Rules and Regulations Implementing the  
Telephone Consumer Protection Act of 1991

Petition for Declaratory Ruling of All About  
the Message, LLC

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: CG Docket No. 02-278  
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**REPLY COMMENTS OF VINCENT LUCAS IN OPPOSITION TO THE PETITION**

I. AATM has attempted to mislead this Commission by intentionally withholding facts highly relevant to their Petition. Their extreme lack of candor is sufficient reason to reject the Petition.

A. The Stratics/AATM direct-to-voicemail calling service is used for illegal telemarketing robocalls

The comments of Miltenberger and Snyder confirmed exactly what I suspected: Stratics/AATM direct-to-voicemail calls are used for illegal telemarketing robocalls --- exactly the type of robocalls that Chairman Pai called “the scourge of civilization”<sup>1</sup> (quoting Sen. Fritz Hollings) and vowed to work to eliminate.<sup>2</sup> AATM petitions for these direct-to-voicemail calls to be excluded from TCPA regulations or in the alternative to grant a blanket exemption to all their customers – while fully knowing, but not disclosing to this Commission – that its customers have used direct-to-voicemail to make universally hated telemarketing robocalls. AATM did not

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<sup>1</sup> Remarks Of FCC Commissioner Ajit Pai At The First Meeting Of The Robocall Strike Force, 8/19/16 [[https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-340872A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-340872A1.pdf)]; Twitter feed of Chairman Pai [<https://twitter.com/ajitpaifcc/status/766667688454283264>]

<sup>2</sup> *Id.*; Statement of Chairman Pai Re: Advanced Methods to Target and Eliminate Unlawful Robocalls [FCC-17-24A2.pdf]

disclose that its Petition was in reaction to a lawsuit regarding use of its service for illegal telemarketing robocalls.

In DOC-340872A1.pdf, Chairman Pai paints a picture of missing an exciting part of a football game due to an illegal robocall. Let me paint a similar picture. As in Chairman Pai's picture, you are watching an exciting fourth quarter drive of a close football game between your favorite team and their rival. You hear an alert from your cellphone that you have just received a new voicemail. Although you want to ignore the voicemail to focus on the game, you can't. You keep wondering, what is that voicemail about. Maybe it's something important, like a message from your babysitter. Like many Americans, you might be somewhat addicted to your smartphone, and feel the urge to check your phone whenever you hear the new voicemail or text message alert.<sup>3</sup> Your curiosity gets the better of you and you decide to check the message. It's another one of those damn telemarketing calls! Or maybe it is another one of those damn calls from a political organization asking you yet again for more money! After you delete the message, you see on the TV that you just missed the winning touchdown – in order to listen to that stupid message!

Now picture what happens if the Commission grants the AATM petition. Instead of just receiving one new voicemail alert during the fourth quarter, you receive several. Companies are now flooding your voicemail with messages because direct-to-voicemail calls are completely unregulated by the FCC. You call back those damn telemarketers and that political organization and tell them not to call you. But they just ignore your repeated do-not-call requests, because

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<sup>3</sup> See Lucas Comments at 4 regarding the studies on effects of telephone alerts on concentration and attention

they are under no legal obligation to respect your DNC request. The political organization even thinks it has a First Amendment right to fill up your voicemail with requests for money.

B. The AATM Petition uses false, deceptive terminology

The AATM Petition's exhibits refer to direct-to-voicemail calls as "ringless voicemail". This is false. On my cellphone I hear a voicemail ring tone<sup>4</sup> when I get new voicemail. Lucas Decl. ¶¶ 2-5. The expert testimony of Hansen also states that cellphones have an audible alert for receiving new voicemails. Hansen Decl. ¶ 10. Instead of indulging AATM in their deceptive terminology, I will call their system what it really is: direct-to-voicemail calls or "D2V calls"

C. The AATM Petition makes other false, deceptive statements about direct-to-voicemail calls.

As numerous commenters point out, many consumers do incur charges for direct-to-voicemail calls. Tracfone is one of the leading companies in prepaid wireless phone service. Tracfone's Terms and Conditions<sup>5</sup>, Section 3, make clear that its customers are charged airtime minutes to access their voice mail. "Airtime minutes are deducted for ... calls to access your voice mail." See also Lucas Decl. ¶ 6-7.

Even customers that are not prepaid plans can incur extra charges as a result of direct-to-voicemail calls. Hansen Decl. ¶ 14; Snyder Decl. ¶¶ 68-76.

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<sup>4</sup> On nearly all modern cell phones, the ring tones can be customized to whatever sound the cell phone user chooses. It could be the traditional sound of a bell ringing, or it could be any other sound.

<sup>5</sup> <https://www.tracfone.com/termsandconditions?lang=en> accessed 6/2/17

D. The Commission should investigate how the AATM D2V system works. The system may violate other telecommunication law.

In light of AATM's appalling lack of candor with this Commission, this Commission should not accept at face value AATM's statements about how its direct-to-voicemail system works. AATM might be withholding highly relevant information about how its system is implemented. AATM claims that it has some backdoor way for "Stratics' computers to communicate directly with the carrier telephone companies' computers." Petition at 3. However, the Petition does not say how this is accomplished. Why would telecom companies give Stratics such access to their computers? Can a member of the general public do the same thing, and if so, exactly how? I did research over the internet to try to find out how this could be accomplished. I researched AT&T, Verizon, and Tracfone and did not find any way, publicized by these companies, for someone to deposit a voice message to a voicemail account associated with a wireless telephone number other than to make some sort of telephone call.

Stratics' backdoor communication with telephone company computers might be unauthorized access to a computer system, or a violation of the terms of service for access to the computer system, especially when that access is used to deposit telemarketing messages en masse. If the telephone companies are providing Stratics or telemarketers with a means that is not publicized to the general public of depositing voice messages, the telephone company is likely violating 47 U.S.C. § 202(a)<sup>6</sup>. If the telephone companies are willingly or knowingly

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<sup>6</sup> "It shall be unlawful for any common carrier to ... make or give any undue or unreasonable preference or advantage to any particular person [or] class of persons ..."

providing Stratics with a backdoor means of depositing voicemail messages en masse for telemarketing purposes, they are potentially liable for damages under 47 U.S.C. § 206.<sup>7</sup>

## II. Direct-to-voicemail calls are “calls”

As many commenters point out, D2V calls fit dictionary definitions of “call”.

“Telephone call - A communication or conversation by telephone” Oxford Dictionary online<sup>8</sup>. “Call (n.) – An instance of speaking to someone on the phone or attempting to contact someone by phone.” *Id.*<sup>9</sup> definition (3). “Call (tr.v.) – (1) to get or try to get in communication with by telephone \* *call the doctor to make an appointment* (2) : to generate signals for (a telephone number) in order to reach the party to whom the number is assigned” Merriam-Webster Online<sup>10</sup>, definitions (1)(m)(1) and (1)(m)(2).

Significantly, the voice message is directed to a specific telephone number, the recipient receives an alert on his/her telephone when the voice message is received, the caller expects the recipient to listen to the message by telephone and the voice message can only be retrieved or deleted through the telephone. Lucas Reply Decl. Since the message is retrieved by telephone, it is a “communication ... by phone” and is “an instance of ... attempting to contact someone by phone”, satisfying the Oxford and Merriam Webster definitions. Also, the Stratics system clearly “generate[s] signals for (a telephone number) in order to reach the party to whom the number is assigned”, satisfying the Merriam-Webster definition (1)(m)(2). Referring to D2V

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<sup>7</sup> “In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, ... such common carrier shall be liable to the person or persons injured ...” (emphasis added).

<sup>8</sup> [https://en.oxforddictionaries.com/definition/telephone\\_call](https://en.oxforddictionaries.com/definition/telephone_call)

<sup>9</sup> <https://en.oxforddictionaries.com/definition/call>

<sup>10</sup> <https://www.merriam-webster.com/dictionary/call>

calls as “calls” is also in harmony with other definitions for “call” such as “A cry made as a summons or to attract someone's attention.” Oxford Dictionary, “call” definition (1).

Recognizing D2V calls as “calls” is also consistent with this Commission’s rulings that SMS messages and internet-to-text messages are calls. 2015 TCPA Order, FCC 15-72 ¶¶ 107-118, 122. This Commission rejected the notion that these are not calls because they are delivered in a different manner than traditional calls. The Commission found that ruling otherwise would “elevate form over substance, thwart Congressional intent that evolving technologies not deprive mobile consumers of the TCPA’s protections, and potentially open a floodgate of unwanted ... messages to wireless consumers.” Id. ¶ 115. The comments of Holcombe go into further detail on these points, and the expert opinion of Snyder shows that D2V “technology” functions the same as automated text message technology and internet-to-text message technology.<sup>11</sup>

### III. Direct-to-voicemail calls are telecommunications under the Telecommunications Act

AATM argues, completely absurdly, that direct-to-voicemail calls are not even telecommunications. Petition at 5-6. Even assuming that a common carrier’s provision of a voicemail account to a wireless subscriber is an “information service”, the act of one person depositing a voice message into another person’s voicemail account clearly meets the definition of “telecommunications” in 47 U.S.C. § 153(30) and is therefore covered by the Telecommunications Act.

### IV. Reply to specific comments

I considered only comments made prior to the comment due date. There have been many express comments by consumers in opposition to the Petition.

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<sup>11</sup> Snyder Decl. ¶¶ 43-63.

The comments of National Consumer Law Center are excellent once again.

The comments of the U.S. Chamber of Commerce want the Commission to limit the TCPA only to technologies that existed in 1991.<sup>12</sup> This is extremely shortsighted. Since new technologies quickly evolve, the TCPA would become obsolete if it were limited to technologies in existence in 1991. Neither Congress nor the public expressed the desire for the TCPA to become obsolete by new technology. New technologies have brought two changes that make the TCPA more relevant than ever: 1. It is easier for foreign telemarketers to call. 2. The public's dependence on their cell phones have increased dramatically. The public is getting more robocalls than ever, and is more irritated by robocalls than ever. Surely Congress's intent must have been for the TCPA to continue to provide protection to consumers.

Contrary to the beliefs of the Chamber of Commerce, the TCPA was not intended to be limited to "scam telemarketers". So called "legitimate domestic businesses" are also prohibited from illegal robocall telemarketing. Naples Nissan, the subject of the AATM telemarketing litigation, appears to be a "legitimate domestic business". Make no mistake, if the Commission legitimizes direct-to-voicemail telemarketing by granting the Petition, legitimate businesses will absolutely utilize D2V calls to fill consumer voicemails with unwanted telemarketing sales pitches.

The AFSA "generally supports" the Petition but suggests various "basic requirements" for the messages and relaxed regulations for information only messages. However, the AFSA

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<sup>12</sup> "The Chamber is well positioned to comment on the need for the Commission to stop expanding the TCPA's prohibitions to new technologies that did not exist in 1991, when the statute was enacted". U.S. Chamber comments at 1.

comments miss the problem. If the Petition is granted, direct-to-voicemail are not even “calls” at all, and would be completely outside of any TCPA regulations.

The NCHER comments admit that “NCHER is not familiar with this technology”, but supports the Petition anyway. NCHER really ought to learn about the technology and its potential use for telemarketing before making comments.

I was most disappointed by the comments of the Republican National Committee. The comments go against the long standing bipartisan support for the TCPA and go against the efforts of the current administration under Chairman Pai to address unwanted robocalls, and are actually quite infuriating to the grassroots supporters of the RNC. The RNC comments are addressed in the next section.

## V. The RNC comments

### A. The TCPA has had longstanding, strong bipartisan support

The TCPA was enacted by Republican President George H.W. Bush at 1991, with bipartisan support --- most notably the support of Democratic Senator Hollings. Since its enactment, every Republican administration has acted to strengthen the TCPA in some way. The National Do Not Call registry was created under Republican President George W. Bush in 2003. Under the leadership of Chairman Pai, the Commission has reaffirmed its commitment to stopping unwanted robocalls, through the work on Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59. See Chairman Pai’s comments referenced earlier.<sup>13</sup>

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<sup>13</sup> Supra n. 1 and 2.



The TCPA, and especially the protections against robocalls, has been one of the few things that Republicans and Democrats have historically agreed upon. Consumer protections against robocalls should remain a bipartisan/nonpartisan issue.

B. The RNC's recent position goes against the grassroots of the Republican party

The RNC has received a lot of negative attention for its support of the AATM petition – and quite deservedly so.<sup>14</sup> The RNC ignores the obvious implications of the Petition for unwanted telemarketing robocalls.

I live right in the middle of Trump country. During the 2016 presidential campaign, the yards in my neighborhood were filled with Trump/Pence signs. If Hillary was mentioned at all on a sign on my neighborhood, it was in the context of “lock her up.” So, I can say, with absolute confidence, that the RNC's position on the AATM petition goes completely against what the grassroots of the Republican Party wants. The idea of allowing robocalls to go directly to voicemail angers me, and it angers my neighbors who voted for Trump. If the Republican Party abandons its tradition of support for the TCPA and instead supports robocalls – which are hated by so many Americans – the Republicans are going to lose control of Congress and then the Presidency – “big time”. “It won't even be close.”

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<sup>14</sup> For example,  
<http://www.chicagotribune.com/bluesky/technology/ct-gop-robo-call-voicemails-20170525-story.html>  
[https://www.washingtonpost.com/news/the-switch/wp/2017/05/25/republicans-want-to-let-robocalls-spam-your-voicemail/?utm\\_term=.14162573b438](https://www.washingtonpost.com/news/the-switch/wp/2017/05/25/republicans-want-to-let-robocalls-spam-your-voicemail/?utm_term=.14162573b438)  
<https://arstechnica.com/tech-policy/2017/05/republicans-claim-1st-amendment-right-to-send-you-robo-voicemails/>  
<https://www.techdirt.com/articles/20170524/06323637443/rnc-chamber-commerce-want-robocallers-to-be-able-to-spam-your-voicemail-without-your-phone-ringing.shtml>

### C. The TCPA does not violate the RNC's First Amendment rights

The Constitutionality of the TCPA has been upheld many times. In summary, the TCPA is a reasonable time, manner, place (TMP) restriction on speech. The RNC has many other means of communicating with people. Although the TCPA is not strictly content neutral, since it imposes greater restrictions on commercial speech<sup>15</sup>, it is viewpoint neutral, because every other political party is subject to the same TCPA restrictions as the RNC. Additionally, when speech is forced into one's home or forced onto a person, such as by robocalls, the recipient is a captive audience. The First Amendment allows the government to protect the privacy interests of captive audiences.

### VI. A retroactive waiver should be denied.

The AATM Petition requests a waiver for all its customers – including customers that used its services for blatantly illegal telemarketing robocalls. The Petition of course did not disclose the fact that its services had been used for telemarketing robocalls. The Commission clearly should not issue such a waiver.

## CONCLUSION

The AATM petition should be denied.

Respectfully submitted,

Vincent Lucas, Ph.D.

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<sup>15</sup> Commercial speech is given less protection under the First Amendment than other types of speech.

REPLY DECLARATION OF VINCENT LUCAS

1. To the best of my knowledge, the only way for me to retrieve a voice message sent to the voicemail account associated with my cell phone is for me to use a telephone.

I declare under penalty of perjury that the foregoing is true and correct. Executed 6/2/2017.

/s/ Vincent Lucas